

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI

MEDICAL SUPPLY CHAIN, INC.,)	Case No. 05-0210-CV-W-ODS
)	
Plaintiff,)	
)	
NOVATION, LLC)	
NEOFORMA, INC.)	
ROBERT J. ZOLLARS)	
VOLUNTEER HOSPITAL ASSOCIATION)	
CURT NONOMAQUE)	
UNIVERSITY HEALTHSYSTEM CONSORTIUM)	
ROBERT J. BAKER)	
US BANCORP, NA)	
US BANK)	
JERRY A. GRUNDHOFFER)	
ANDREW CESERE)	
THE PIPER JAFFRAY COMPANIES)	
ANDREW S. DUFF)	
SHUGHART THOMSON & KILROY)	
WATKINS BOULWARE, P.C.)	
)	
Defendants.)	
)	

**SUGGESTIONS IN REPLY TO PLAINTIFF’S SUGGESTION IN OPPOSITION TO
NEOFORMA, INC.’S MOTION TO DISMISS COMPLAINT, OR ALTERNATIVELY
TO REQUIRE AMENDMENT, PURSUANT TO F.R.C.P. RULES 8 AND 9**

I. INTRODUCTORY STATEMENT

Facing a motion to dismiss its complaint because it is largely unintelligible in the first place, plaintiff now completely fails to respond to Neoforma’s motion on any substantive ground. Rather, plaintiff has submitted for this Court’s consideration only seven lines through which it attempts to “incorporate by reference” at least three other oppositions it has filed in response to different motions on different matters with respect to different defendants. Plaintiff then goes on to compare Neoforma’s refusal to answer the 115-page complaint with the actions

of other defendants, and “welcomes” Neoforma’s assistance in “drafting a pretrial order,” the latter meaning of which is altogether unclear.

This nonsensical and insufficient response to Neoforma’s motion should be disregarded, Neoforma’s motion should be granted, and the complaint against Neoforma should be dismissed.

II. PLAINTIFF HAS MISUSED RULE 10(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 10(c) of the Federal Rules of Civil Procedure allows a party to incorporate by reference statements made in another pleading previously filed in a case. Fed. R. Civ. P. 10(c). However, this rule of convenience contains restrictions on its use. The permitted incorporation cannot simply adopt vast and multifarious pages of other documents without providing the degree of clarity needed for the responding party to understand the nature and extent of the incorporation. *See Grenier v. Medical Engineering Corp.*, 243 F.3d 200, 205 (5th Cir. 2001); *Heintz & Co., Inc. v. Provident Tradesmens Bank & Trust Co.*, 29 F.R.D. 144, 145 (E.D. Pa 1961). At minimum, the incorporating reference must refer to the specific paragraphs of the other document(s) being relied upon. *Toberman v. Copas*, 800 F.Supp. 1239, 1243 (M.D. Pa 1992) (incorporation must “at a minimum” provide direct reference to paragraphs relied upon); *Federal Nat’l Mortgage Ass’n v. Cobb*, 738 F.Supp. 1220, 1226-27 (N.D. Ind. 1990) (statements to be incorporated must be specifically identified).

Here, plaintiff’s amorphously vague reference to and attempted incorporation of “its suggestion opposing VHA, UHC and Novation’s motion for dismissal” – three different defendants who have all asserted different bases for dismissal of plaintiff’s complaint – cannot possibly meet the clear and specific standard recognized by the federal courts as the proper use of Rule 10. Nor is it a sufficient response to Neoforma’s motion to dismiss pursuant to Rules 8 and 9 of the Federal Rules of Civil Procedure.

III. NO AUTHORITY BINDS NEOFORMA TO THE ACTIONS OF ITS CO-DEFENDANTS

In opposing Neoforma's motion to dismiss under Rule 8 and 9, plaintiff asserts that "other defendants were able to answer or in the alternative seek dismissal." (Opposition, ¶ 2). This, however, is insignificant. Plaintiff cites no authority for this proposition being binding on the Court, because none exists. Neoforma is not bound to answer a complaint served on it simply because other defendants have chosen to answer, and especially where, as here, those defendants have also moved for dismissal of the complaint.

Nor is the fact that other defendants' have chosen to respond with a Rule 12 motion persuasive on the point of whether a Rule 8 motion as to Neoforma is well taken or not. The issue for the Court is objectively whether this pleading meets with the requirements of Rule 8 or not, and as briefed in Neoforma's initial Suggestions in support of the motion, the complaint is not proper under Rule 8. While one can admire the attempt by other defendants to make sense of the complaint in propounding a response under Rule 12, a perusal of the Suggestions filed by those defendants in support of their Rule 12 motions illustrates a similar perception of the incomprehensiveness of plaintiff's pleading. If anything, those documents support the propriety of granting the Rule 8 motion.

IV. CONCLUSION

Because plaintiff has failed properly to respond to Neoforma's motion to dismiss, and for all the reasons set forth in Neoforma's initial moving papers, the motion should be granted and the complaint against Neoforma should be dismissed in its entirety.

Respectfully Submitted

s/ John K. Power

John K. Power
Husch & Eppenberger, LLC
1200 Main Street, Suite 1700
Kansas City, MO 64105
816-421-4800
816-421-0596
john.power@husch.com

Stephen N. Roberts
Janice Vaughn Mock
Nossaman, Guthner, Knox & Elliott
50 California Street, 34th Floor
San Francisco, CA 94111
415-398-3600
415-398-2438
sroberts@nossaman.com
jvaughnmock@nossaman.com

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2005, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following::

Andrew M. DeMarea	ademarea@stklaw.com
Jonathan H. Gregor	jgregor@stklaw.com
Kathleen Ann Hardee	khardee@stklaw.com
Bret D. Landrith	landrithlaw@cox.net
Mark A. Olthoff	molthoff@stklaw.com
Logan Wade Overman	logan.overman@stklaw.com

/s/ John K. Power

John K. Power